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# Constitutional Law - An Involuntarily Detained Mental Patient's Informed Consent Is Invalid for Experimental Psychosurgery

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## DISCUSSION OF RECENT DECISIONS

## CONSTITUTIONAL LAW—AN INVOLUNTARILY DETAINED MENTAL PATIENT'S INFORMED CONSENT IS INVALID FOR EXPERIMENTAL PSYCHOSURGERY—*Kaimowitz and John Doe v. Department of Mental Health for the State of Michigan*, No. 73-19434-AW (Mich. Cir. Ct., Wayne County, July 10, 1973).

"We have not yet seen what man can make of man"[1] are the closing words of B. F. Skinner's *Beyond Freedom and Dignity*, the apology of behavior modification psychology. But in hundreds of mental institutions across the country the meaning of that sentence is belied. We can see what man has made of man, if we choose to look. Recently a Michigan court has chosen to look, and the resulting opinion is both remarkable and provocative. The decision in the case of *Kaimowitz and John Doe v. Department of Mental Health for the State of Michigan*[2] is remarkable as it is the only known case dealing with psychosurgery,[3] an operative procedure which has been performed on more than fifty thousand American mental patients in the last thirty years. The *Kaimowitz* decision is provocative as it adopts a constitutional argument to invalidate an informed consent document signed by a willing patient. The purpose of this discussion is threefold: to examine the use of psychosurgical procedure and its effects on the experimental subject, to explain and evaluate the reasoning of the *Kaimowitz* decision, and to explore possible legislative solutions to the legal questions posed by psychosurgery on confined persons.

### I. PSYCHOSURGERY: USE AND EFFECT

It is necessary to distinguish psychosurgery from all other modes of therapy used in the treatment of the mentally ill. The conventional modes of treatment, psychoanalysis,[4] group therapy,[5] and environmental therapy[6]

1. SKINNER, BEYOND FREEDOM AND DIGNITY, 206 (1971).

2. Kaimowitz and John Doe v. Department of Mental Health for the State of Michigan, No. 73-19434-AW (Mich. Cir. Ct., Wayne County, July 10, 1973). [Hereinafter referred to as Kaimowitz.]

3. A Kentucky woman, blinded by psychosurgery, settled her suit out of court for six hundred thousand dollars. In Virginia legal action is being considered to prevent psychosurgery on a self-mutilating mental patient. *Psychosurgery*, 225 J.A.M.A. 1035 (1973).

4. The recognition of the basis of mental disruption is discovered through therapy dialogues. WATSON, PSYCHIATRY FOR LAWYERS (1968).

5. The recognition and control of mental disorders through the verbal and emotional interaction of two or more persons and a therapist. BLINDER, PSYCHIATRY IN THE EVERYDAY PRACTICE OF LAW (1973).

6. This therapy focuses on alteration of the emotional climate surrounding the

rely on verbal interaction between the subject and therapist. They require cooperation from the patient who thereby controls his own therapeutic progress. In the past four decades these conventional modes of treatment have been augmented or entirely replaced by physical methods such as psychopharmacology,[7] electroshock treatments,[8] and psychosurgery.[9] These organic treatments do not require cooperation from the patient, and may in fact be administered against his will. In each, there is a risk of seriously adverse effects on the subject. The prolonged use of tranquilizing or neuroleptic drugs may cause a syndrome of nervous disorders.[10] Electroshock treatments may result in broken or fractured bones.[11] However, psychosurgery removes or destroys irreplaceable brain cells and tissues. The operation is completely irreversible. The patient's brain cannot be treated with drugs or placed in a plaster cast to be restored to its previous state. Thus, psychosurgery occupies a unique position in the continuum of psycho-medical treatment for the mentally ill.

The term psychosurgery refers to a variety of operative procedures which attempt to modify patient behavior by surgical techniques. The most familiar form of psychosurgery is the lobotomy; the amputation of the prefrontal, bimedial, or transorbital portions of the brain. Included within the scope of psychosurgery are those operative procedures which cauterize, place lesions, or inject foreign substances into specific areas of the brain.[12] Psychosurgery has been used to modify such diverse behavior as homosexuality, frigidity, hyperactivity, schizophrenia, acute depression, criminal activity, compulsive gambling, alcoholism, and drug addiction.[13]

Although psychosurgery has been performed on more than fifty thousand patients, it is difficult to assess its effect.[14] Because of the wide variety

patient and employs occupational therapy workshops, halfway houses, and community release programs. DERSHOWITZ, GOLDSTEIN, KATZ, PSYCHOANALYSIS, PSYCHIATRY, AND THE LAW 713 (1967).

7. The treatment of mental disorders with any of the following types of drugs: anti-psychotics, anti-depressants, tranquilizers, hormones, and neuroleptics. Crane, *Clinical Psychopharmacology*, 181 SCIENCE 124 (1973).

8. Developed in Italy in the 1930's, this treatment utilizes an alternating electrical current passed through the patient's brain to produce a convulsive shock, *supra* note 6, at 713.

9. The amputation or destruction of brain cells and tissues, *supra* note 6, at 713.

10. The resultant nervous syndrome, tardive dyskinesia, is characterized by drowsiness, jaundice, impotence, loss of muscle control, and excessive weight gain. *See Tardive Dyskinesia*, 129 AM. J. PSYCHIATRY 466 (1972).

11. The incidence of broken or fractured bones among patient's receiving this therapy is estimated at one-half of one per cent, *supra* note 6, at 714.

12. Refinements on the classical lobotomy are the cingulotomy (lesions placed in the cingulum portion of the brain), thalamectomy (cauterization of the lower brainstem nuclei connected to the cortical areas), and diathermy (injection of foreign substances such as olive oil into the brain). Trotter, *A Clockwork Orange in a California Prison*, 101 SCI. NEWS 174 (1972).

13. *Id.* at 175.

14. Medical literature in this area is exceptionally biased and it is difficult to

of techniques that are utilized to eliminate an even greater variety of behavioral problems, no conclusive quantitative or qualitative determinations can be advanced. Some longitudinal studies[15] have indicated that the psychosurgical patient experiences a profound reduction in the human functions related to the frontal lobes—insight, empathy, sensitivity, self-awareness, judgment, and emotional responsiveness.[16] Critical observers have characterized these patients as "vegetables" and "lost souls".[17] Conversely, without this operation each of these patients was doomed to a lifetime of confinement in a mental institution. Psychosurgery has enabled the rehabilitation and release of many otherwise hopelessly ill persons.

It is difficult to estimate the number of psychosurgical operations performed yearly in America, as the procedures and results are not necessarily published in medical journals. It appears that between four hundred and six hundred such operations are performed annually.[18] International medical literature indicates that psychosurgery is being used increasingly to control antisocial behavior, aggression and hyperactivity.[19] It is inescapable that psychosurgery has come to be regarded as commonplace in the medical world. However, the *Kaimowitz* decision and pending legislation may reverse this spiraling trend.

## II. THE KAIMOWITZ DECISION

### A. *The Proposed Psychosurgical Experiment*

In 1972, the Michigan state legislature allocated state funds for an experimental program to "investigate the results of medical versus surgical treatment of patients committed to the state hospital system for the criminally insane because of severe uncontrollable emotional outbursts."[20] Several individuals were to be chosen as subjects for the medical portion of the experiment,[21] with the single qualification that they suffer from severe uncontrollable outbursts. A John Doe was to be chosen for the surgical portion

distinguish fact from opinion. *Compare* DELGADO, PHYSICAL CONTROL OF THE MIND—TOWARD A PSYCHO-CIVILIZED WORLD (1969); Andy, *Neurosurgical Treatment of Abnormal Behavior*, 252 AMER. J. MED. SCI. 232 (1966), *with* Breggin, *Lobotomies: An Alert*, 129 AM. J. PSYCHIATRY 97 (1972); Breggin, *Lobotomies Are Still Bad Medicine*, 8 MED. OPIN. 32 (1972).

15. Freeman, *Frontal Lobotomy: Long Follow-up in 415 Cases*, 119 BRIT. JOUR. PSYCHIATRY 621 (1971).

16. 118 CONG. REC. E1605 (daily ed. Feb. 24, 1972).

17. *See* note 3 *supra.*

18. 118 CONG. REC. E1602 (daily ed. Feb. 24, 1972).

19. Balasubramaniam, Kanaka, Ramanugam, Ramanurthi, *Surgical Treatment of Hyperkinetic and Behavior Disorders*, 54 INT'L SURGERY 18 (1970).

20. Appendix to opinion, titled *Study of the Treatment of Uncontrollable Aggression.*

21. The proposed study would compare surgical results with those obtained by the prolonged use of cyprotrone acetate, an anti-androgen drug, in suppressing aggressive behavior. *Id.* at 2.

of the experiment.[22] He was to be a male over twenty-five years of age with an I.Q. of at least eighty, who had been confined within the state mental health system for five years or more.[23] Further, John Doe must have experienced several attacks of severe aggressive behavior. He must have resisted all conventional modes of treatment. The proposal required John Doe's voluntary informed consent, in addition to that of his parent or guardian.[24] To further protect John Doe, the project abstract established a review committee of physicians to evaluate the candidate's suitability for the surgical procedure. A second review committee, consisting of a clergyman, a law professor, and a community representative, was established to insure the validity of the informed consent document signed by the subject and his guardian.

Within the Michigan State Hospital System, there was one John Doe who met all the qualifications for the state funded project. That man was Mr. Louis Smith. He had been committed without trial to the Ionia State Mental Hospital in 1955 for the suspected murder and rape of a student nurse at Kalamazoo State Hospital where he had previously been confined. The surgical procedure was fully explained, and both Louis Smith and his parents signed the consent document. Relying on the validity of this document and the ratification by both review committees, the first step of the experimental psychosurgery, electrodepthography, was scheduled for January 15, 1973.

Shortly before the scheduled operation, the plaintiff in this action, Gabe Kaimowitz, a legal worker in Detroit, became aware of the proposed experimental study. He disseminated this information to the mass media, and extensive publicity followed. Immediately thereafter, this action was brought on a writ of habeas corpus alleging that Louis Smith was illegally held under the Michigan Criminal Sexual Psychopathic Persons Law.[25] On the request of counsel, a three judge court was empanelled pursuant to Michigan civil procedure.[26] On March 23, 1973, that court determined that Louis Smith's confinement in the Ionia State Hospital was illegal. He was removed from

22. The surgical procedure requires the implantation of electrodes, referred to as electrodepthography, to test the patient for electrical stimulation of cortical areas. After isolating the abnormality, these electrodes are to be removed and the abnormality will be treated by electro-coagulation or block resection. *Id.* at 3. For a complete medical description of the proposed operation *see Psychosurgery*, 225 J.A.M.A. 915 (1973).

23. Appendix to opinion at 7.

24. *Id.* at 8.

25. C.L. 780.501 *et seq.* Criminal Sexual Psychopathic Person:

> any person who is suffering from mental disorder and is not feebleminded, which mental disorder is coupled with criminal propensities to the commission of sex offenses is hereby declared to be a criminal sexual psychopatic person.

This statute was repealed by P.A. 1968, No. 143 ss.2 August 1, 1968 and Smith was thereafter detained pursuant to C.L. 330.35(b) which governs the parole and discharge of criminal sexual psychopathic persons.

26. Kaimowitz, *supra* note 2, at 6.

the jurisdiction of the Michigan Department of Mental Health whereupon he immediately revoked his consent to the proposed surgery. The court found that, as the issue of the validity of a mental patient's consent to psychosurgery was likely to present itself again for adjudication, the question was not moot.[27] The legal issues raised were decided in the plaintiff's favor in the form of a declaratory judgment.

### B. *The Constitutional Basis and Informed Consent*

The declaratory judgment addresses itself to a single issue:

> After the failure of established therapies, may an adult or a legally appointed guardian if the adult is involuntarily detained at a facility within the jurisdiction of the Department of Mental Health for the State of Michigan, give legally adequate consent to an innovative and experimental surgical procedure on the brain, if there is demonstrable physical abnormality of the brain and if the procedure is designed to ameliorate behavior which is either personally tormenting to the patient or so profoundly disruptive that the patient cannot safely live or live with others?[28]

The three judge *Kaimowitz* court answered this question in the negative.

As a necessary preface to its disposition of this case, the court emphasized that it is clearly within the police power of the state to control a citizen's right to consent to certain physical activities that conflict with public policy. Thus the state may withhold from a person the right to consent to such acts as suicide or mayhem upon himself. In England, suicide was a felony punishable by ignominious burial.[29] By American common law suicide is generally regarded as *malum in se* and a grave public wrong. Similarly, consent has never been recognized as a valid defense to a charge of mayhem.[30] This approach is the outgrowth of a feudal attitude that a subject owed to the king certain duties that suicide or mayhem upon oneself would render impossible to perform. In America, this attitude, commingled with a traditional reverence for life, has defined the relationship of the citizen to the state in this area. Most jurisdictions regard self-mutilation or suicide as a crime, albeit unpunishable, thus denying the citizen the right to consent to it.[31]

Conversely, the state may dictate and require consent on the part of an individual to certain physical acts consistent with public policy. This situation most often presents itself in connection with the religious beliefs of Jehovah's Witnesses and Christian Scientists. Where a religious scruple interferes with the administration of necessary medical treatment, that treat-

27. *See* United States v. Phosphate Export Association, 393 U.S. 199 (1968).
28. Kaimowitz, *supra* note 2, at 8.
29. 4 Geo.IV, Ch.52 ss.1.
30. Annot., 86 A.L.R.2d 268 (1957).
31. Burnett v. Illinois, 204 Ill. 208, 68 N.E. 505 (1903).

ment is judicially mandated despite the individual's objection. Without exception, if the patient is a minor,[32] a pregnant woman,[33] a mother,[34] or a legal incompetent as a result of the illness,[35] courts refuse to recognize that patient's right to consent to death by lack of treatment.[36] Relying on this judicially implemented state police power, the *Kaimowitz* court invalidated the consent document signed by Louis Smith. This determination effectively denies to all involuntarily confined persons under the jurisdiction of this Michigan court the right to consent to this operative procedure.

Experimental mind surgery performed under government auspices is an issue fraught with political and moral considerations. The *Kaimowitz* court attempted to circumvent these considerations by framing its decision in the traditional language of informed consent. Informed consent focuses on information (what a reasonable patient must know to make an intelligent decision) and assent (sufficient indication that the patient has granted permission for the medical treatment).[37] In addition to these two criteria, California[38] and Oregon[39] require the physician to disclose to the patient any and all feasible alternative treatments for his illness. This is the approach which has been used in evaluating the validity of informed consent to psychosurgery by a nonconfined person.[40]

However, the *Kaimowitz* court posits a more stringent test. As "there are compelling constitutional considerations that preclude the involuntarily detained mental patient from giving effective consent to this type of surgery,"[41] that consent must be given competently, knowingly, and voluntarily. These three requirements constitute a further limitation on the requirements of informed consent indicated above. They are the essential elements for an effective waiver of a constitutional right. As articulated by the Supreme Court, "waivers of constitutional rights not only must be voluntary, but must be knowing intelligent acts done with sufficient awareness of the relevant circumstances and the likely consequences."[42] Informed consent is a misnomer in this case, as the *Kaimowitz* court has determined that the right involved is of constitutional proportion and consequently the waiver must meet constitutional standards.

32. People ex rel. Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952); Mitchell v. Davis, 205 S.W.2d 812 (Tex. Civ. App. 1947).

33. Raleigh-Fitkin Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964).

34. J.F. Kennedy Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670 (1971); Application of the President of Georgetown Univ., 331 F.2d 1000 (D.C. Cir. 1964).

35. United States v. George, 239 F. Supp. 752 (D. Conn. 1965).

36. In re Brook's Estate, 32 Ill. 2d 361, 205 N.E.2d 435 (1965).

37. Waltz, *Informed Consent*, 64 Nw. L.R. 628 (1969).

38. Cobbs v. Grant, 8 Cal. 3d 229, 502 P.2d 1 (1972).

39. Gitchell v. Mansfield, 269 Or. 174, 489 P.2d 953 (1971).

40. Belshaw v. Feinstein, 258 Cal. App. 2d 711, 65 Cal. Rptr. 788 (1968).

41. Kaimowitz, *supra* note 2, at 32.

42. Brady v. United States, 397 U.S. 742, 748 (1970); Escobedo v. Illinois, 378 U.S. 478 (1963); Miranda v. Arizona, 384 U.S. 436 (1965); Johnson v. Zerbst, 304 U.S. 458 (1938).

The three compelling constitutional considerations noted by the *Kaimowitz* court are the rights of free expression guaranteed by the First Amendment, the right of privacy contained in the penumbra of the First, Fourth, and Fifth Amendments, and the right to be free from cruel and unusual punishment protected by the Eighth Amendment. The court found the requisite state action to permit constitutional analysis, as the patient had been confined in a state mental hospital and the project had been financed by order of the state legislature with state funds.

The court's approach to the First Amendment question is a revolutionary one. It suggests that the First Amendment encompasses within its perameters both the communication *and* the generation of ideas. "To the extent that the First Amendment protects dissemination of ideas and expression of thoughts, it equally must protect the individual's right to generate ideas."[43] The former right is meaningless without the viability of the latter. In support of this position, the court borrowed the words of Mr. Justice Holmes:

> The ultimate good desired is better reached by free trade in ideas —that the best test of truth is the power of the thought to get itself accepted in the competition of the market.[44]

Free trade in ideas necessitates free thought. "Those who won our independence believed that freedom to think as you will and to speak as you think are means indispensible to the discovery and spread of political truth."[45] Extrapolating from these premises, the court agreed with the words of Mr. Justice Cardozo: "Implicit in the very notion of liberty is the liberty of the mind to absorb and to beget."[46] Arguably, the proposed psychosurgery on Louis Smith would violate this First Amendment right to beget ideas.

The second constitutional basis considered by the court is the right of privacy. This right is the logical extension of the Fourth Amendment guarantees made applicable to the states through the Fourteenth Amendment. As expressed by Mr. Justice Brandeis: "The makers of our Constitution conferred as against the government the right to be let alone—the most comprehensive of rights and the right most highly valued by civilized men."[47] This right to be left alone encompasses the marital bed,[48] the sexual habits of consenting adults,[49] and the termination of pregnancy.[50] Does it, how-

43. Kaimowitz, *supra* note 2, at 32.
44. Abrams v. United States, 250 U.S. 616, 630 (1919).
45. Whitney v. California, 274 U.S. 357, 375 (1927).
46. Cardozo, *The Paradoxes of Legal Science*, Columbia University Lectures, reprinted in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 318 (1947).
47. Olmstead v. United States, 277 U.S. 438, 478 (1928).
48. Griswald v. Connecticut, 381 U.S. 479 (1962).
49. Stanley v. Georgia, 395 U.S. 557 (1969).
50. Roe v. Wade, 410 U.S. 113 (1973).

ever, also include the integrity of the mind? An affirmative answer to this question has been given by the Ninth Circuit. In *Mackey v. Procunier*,[51] the federal court held that the forcible injection of an experimental drug[52] into a prisoner in an attempt to modify criminal behavior constituted "impermissible tinkering with the mental processes."[53] The *Kaimowitz* opinion notes that, as psychosurgery is more intrusive than the treatment condemned in *Mackey*, it *a fortiori* falls within the area protected by the right of privacy.

The court refused to consider the plaintiff's third constitutional argument that this psychosurgical experiment is a violation of the Eighth Amendment prohibition of cruel and unusual punishment.[54] This is because Louis Smith, the surgical participant was a criminal imprisoned in the state mental health system. He stood in limbo between the absolute application of the right to treatment approach[55] employed in the investigation of medical treatment for mental patients, and the cloak of administrative discretion automatically employed in the investigation of medical treatment for criminal prisoners.[56] However, in general, the Michigan courts regard the incarcerated psychopathic criminal as more akin to a mental patient than a convict. They acknowledge the right to treatment of those confined under the Criminal Sexual Psychopathic Law.[57] Thus, an analysis of the constitutional argument that the proposed psychosurgery is cruel and unusual punishment was inappropriate in this Michigan jurisdiction.

The determination that the psychosurgery was a violation of constitutional guarantees necessitated evaluation of the three components for the valid waiver of a constitutional right; competency, knowledge, and voluntariness. The first component examined by the court was competency. Questions of competency in institutionalized persons are always questions of degree. Undoubtedly, a patient incompetent to stand trial may be sufficiently competent to consent to medical or psychological treatments. Ostensibly, Louis Smith was competent to make such a choice. Intelligence tests demonstrated that his I.Q. exceeded eighty. His testimony indicated that at the time he signed the consent document he understood the procedures and the risks of the electrodepthography and the stereotactic surgery.

51. 477 F.2d 877 (9th Cir. 1973).

52. The drug used in the aversion therapy was succinycholine. The reaction was termed breath-stopping, paralyzing, and a simulation of a heart attack. *Id.* at 878.

53. *Id.*

54. *See generally* Robinson v. California, 370 U.S. 660 (1963); Furman v. Georgia, 408 U.S. 238 (1972); Holt v. Sarver, 309 F. Supp. (E.D. Ark. 1970).

55. *See generally* Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966); Wyatt v. Stickney, 325 F. Supp. 781 (D.C. Ala. 1971); Note, *The Right to Treatment*, 57 Geo. L.R. 782 (1969); Note, *The Right to Treatment*, 36 U. Chi. L.R. 760 (1969).

56. Haynes v. Harris, 344 F.2d 463 (8th Cir. 1965); Peek v. Ciccone, 288 F. Supp. 329 (W.D. Mo. 1968).

57. Silvers v. People, 22 Mich. App. 1, 176 N.W.2d 702 (1970).

Yet, the same testimony indicated that since 1955 Louis Smith has not been permitted to make any decision of importance. The manner in which he has spent his time, energy and money have been unilaterally dictated by the hospital staff. For eighteen years he has been incompetent to decide whether to go on a picnic, to walk on hospital grounds, or to turn on the light in his room.[58] Louis Smith experienced a gradual erosion of his decision making processes, a phenomenon the court termed "institutionalization."[59] Prolonged incarceration in a mental facility had diminished his capacity for evaluation and judgment. Despite outward manifestations of competency and lucidity, the court reasoned that *a priori*, a patient whose every decision has been superimposed by administrative order cannot independently decide to consent to experimental psychosurgery.

A more perplexing legal question is posed by the court's axiomatic invalidation of the consent document signed by Louis Smith's parents. The record contains a factual dispute as to the extent of information given to the parents. For the purposes of the declaratory judgment, however, the court assumed that sufficient evidence was revealed to them to enable them to make an intelligent choice. Yet, the court found this intelligent choice to be legally ineffective in the psychosurgery situation. "The guardian or parent cannot do what the patient absent a guardian would be legally unable to do."[60] With this comment, the court summarily dismisses any possibility of the validity of the parent's consent. If this were a simple contract question, that proposition might be acceptable. The guardian of an incompetent or a minor cannot legally bind that person to more than a contract voidable at his option.[61] However, if a contract for medical treatment for the incompetent or minor is involved, the signed consent of a parent or guardian is binding.[62] The *Kaimowitz* decision avoids this dilemma by adhering to the constitutional position that ordinarily only the individual can effectively waive his constitutional rights.[63]

The second component required for the valid waiver of a constitutional right is knowledge. In criminal cases, this term has been construed to mean that the suspect or criminal must be informed that a right exists and he must understand the consequences of the waiver.[64] The requirement of the *Kaimowitz* court is more exacting. The subject must be informed of all possible repercussions. But, as "the facts surrounding experimental brain

58. Kaimowitz, *supra* note 2, at 26.
59. *Id.* at 25.
60. *Id.* at 26.
61. Luka v. Lowrie, 171 Mich. 122, 136 N.W. 1106 (1912).
62. Zoski v. Gaines, 271 Mich. 1, 260 N.W. 99 (1935).
63. Gurlseki v. United States, 405 F.2d 253 (5th Cir. 1968).
64. Escobedo v. Illinois, 378 U.S. 478 (1963).

surgery are so profoundly uncertain,"[65] knowledgeable consent is a practical impossibility.

In determining that the nature of the operation itself prevents knowledgeable consent, the court relies on the Ten Nuremberg Standards for Human Experimentation, codified in *United States v. Karl Brandt.*[66] The ten principles were advanced to satisfy moral, ethical, and legal constraints. The subject must give voluntary consent. No experiment is to be conducted if there is reason to believe that a disabling injury or death will result. The experiment must avoid any unnecessary mental or physical suffering. The degree of risk may never exceed the humanitarian importance of the study. The experiment must yield results that are unprocurable by other methods of study. It must be preceded by extensive animal study. Adequate preparation must always be made. Only qualified persons may conduct the experiment. If at any time the subject wishes to withdraw from the experiment, the project must terminate. If there is any indication of danger to the subject, the person in charge must terminate the experiment.

These Nuremberg standards conflict with the nature of Smith's detainment and with the nature of the proposed psychosurgery itself. The *Kaimowitz* court adopted the "risk-benefit" formula that is the underpinning of the principles enumerated above. The inevitable risk is that the operative procedure will result in mental aberration and loss of certain higher cognative functions. Only the surgical subject takes this risk as the medical participants suffer negligible side effects. The predictable benefit is the statistical evaluation of medical versus surgical effectiveness in controlling socially undesirable aggressive behavior. The juxtaposition of this risk and this benefit places the proposed experiment outside the Nuremberg guidelines.

The last component for a valid constitutional waiver is voluntariness. In an institutional setting, there is no such thing as a volunteer. Louis Smith was offered the opportunity to obtain his release from the State Department of Mental Health. Losing a portion of his brain was a small price to pay for that freedom. This type of "free" choice is expressly prohibited by the Nuremberg Standards.

> The person involved must have the legal capacity to consent. He should be so situated as to be able to exercise free power of choice without the intervention of any element of fraud, force, duress, overreaching, or ulterior forms of constraint or coercion.[67]

The institutional atmosphere is inherently coercive, and the lack of meaningful alternatives can operate as an ulterior constraint. This ulterior con-

65. Kaimowitz, *supra* note 2, at 25.

66. United States v. Karl Brandt, reported in THE MEDICAL CASE, U.S. Government Printing Office (1948) and reprinted in KATZ, EXPERIMENTATION WITH HUMAN BEINGS, at 305-07 (1972).

67. *Id.*

straint is sufficient to vitiate the consent of an involuntarily confined mental patient.

The *Kaimowitz* decision, predicated on the theory of constitutional waiver, may have immeasurable ramifications.[68] However, this legal theorization is not irrefutable. In several important respects the *Kaimowitz* decision is subject to criticism.

### C. *Evaluating the Kaimowitz Decision*

The *Kaimowitz* decision must be evaluated on two levels. Is the court's constitutional approach valid and defensible? Is this approach necessary to reach the conclusion that the proposed psychosurgery should not be performed? The *Kaimowitz* approach to the First Amendment is unprecedented, but not unsound. In providing that Congress shall make no law in certain protected areas of speech, assembly, press, and religion, the First Amendment operates as a restriction on the power of government as it relates to the individual. The *Kaimowitz* decision has expanded the spectrum of man's activity to encompass not only speaking, meeting, printing, and worshipping, but also, thinking. In the twentieth century, thinking is an activity susceptible of being measured and controlled. As thinking is the nucleus of all other activity, it is equally deserving of protection. If the psychosurgery itself is a violation of constitutional guarantees, the validity of the consent or waiver must be measured by constittuional requirements.[69]

The court relies on the theory that the right to think is implicit in the right to speak. If this position is to be tenable, the new right to generate ideas must necessarily fit within the framework of existing law regarding the right of free speech. First Amendment rights have never been absolute. Certainly there is no First Amendment right to encourage the "commission of a crime" or to utter "fighting words."[70] This exception to the broad language of the First Amendment is often phrased as follows: if the speech activity creates a clear and present danger of a substantive evil it is not constitutionally protected.[71] By the *Kaimowitz* theory, thoughts and thought processes are protected by the First Amendment. However, criminal and anti-social thoughts that prompt aggressive behavior may create a clear and present danger of a substantive evil. It may be argued, therefore, that un-

68. This informed consent/constitutional waiver approach may be applied to experiments in prisons. *See* Mitford, *Experimentation Behind Bars*, 231 ATLANTIC 64 (1973). Further this theory may be used in possible suits by Alabama girls who were sterilized without their parents' understanding of the procedure and by South Carolina women refused obstetrical care unless they accepted sterilization. In both situations the health clinics involved were operated by the Department of Health, Education, and Welfare. Chicago Sun-Times, Sept. 21, 1973, at 24, col. 1.

69. *See generally* SCHWARTZ, CONSTITUTIONAL LAW, 265 (1972).

70. Cox v. Louisiana, 379 U.S. 559, 562 (1965).

71. Schenck v. United States, 249 U.S. 47, 52 (1919); Dennis v. United States, 341 U.S. 494 (1951).

controlled criminal and anti-social thoughts, such as those which led Louis Smith to rape and kill a student nurse, fall outside the constitutional guarantee. Certain thoughts like certain speech activities may not be protected. An analysis of this highly sensitive question is well behond the scope of this discussion. However, it is probable that any court attempting to adhere to the constitutional approach advanced in *Kaimowitz* will be faced with this issue.

The right of privacy, a derivation from constitutional guarantees, delineates federal or state power. In this respect the language of *Stanley v. Georgia* is illuminating:

> Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds. Whatever the power of the state to control dissemination of ideas inimical to public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.[72]

State funded experimental mind surgery is undoubtedly a violation of the right of privacy. It is only permissible on detained populations if this right is competently, knowingly, and voluntarily waived.

The absence of any of these three elements vitiates the validity of the constitutional waiver. The *Kaimowitz* court took cognizance of the reality of modern mental institutions in determining that a confined patient loses his capacity to make an intelligent decision. It took cognizance of the reality of the state of medical science in determining that the experimental nature of the psychosurgery obviates knowledgeability. And, the court took cognizance of the reality of confinement in determining that an inmate's choice is not truly voluntary. Legal precedent coincides with reality in the first two elements, but it does not in the third. It is not at all unusual or illegal for an institution to maintain certain prerequisites for the release of the mentally or criminally confined. Work-release candidates may be required to consent to the administration of antabuse, a drug which induces nausea when alcohol is consumed.[73] The release of sexual offenders may be predicated on consent to take an anti-androgen drug that prevents erection.[74] Sterilization may be required for feebleminded persons prior to release from a mental institution,[75] or for criminals, as an alternative to prison sentences.[76] Typically, courts view these options as being voluntarily chosen as the individual need only agree to take drugs or be ster-

72. Stanley v. Georgia, 395 U.S. 557, 565-66 (1969).

73. Shelby Penal Farm Inmates v. Hyden, No. 73-192 (W.D. Tenn. May 16, 1973).

74. Field, *Drugs and the Sex Offender*, 13 MED. SCI. LAW 195 (1973).

75. In re Cavitt, 183 Neb. 243, 159 N.W.2d 566 (1966).

76. In re Andrada v. Southern Pasadena Municipal Court, 33 U.S.L.W. 3278, *cert. denied*, 360 U.S. 953 (1965); People v. Tapin, No. 73313 (Santa Barbara Super. Ct., July 7, 1965).

ilized if he or she wishes to be released. "The choice is (his or) hers."[77] In none of these examples has a court found that the coercive atmosphere of the institution vitiates the patient's or offender's consent. Reality dictates that freedom, coupled with any prerequisite, is always preferable to confinement. But perhaps this position is not legally justifiable. However, as the waiver given by Smith lacked competency and knowledgeability it is invalid despite the possibility that it was, in a legal sense, volitional.

Could the *Kaimowitz* court have reached the same answer to this complex political and moral question within the framework of the informed consent doctrine? The two criteria for valid informed consent are that the patient has sufficient information to make an intelligent choice, and that the patient manifests his permission for the treatment. The facts in *Kaimowitz* indicate that these two requirements have been satisfied.

Ordinarily, the doctrine of informed consent requires that the doctor give to the patient all the information he has and can obtain regarding the proposed treatment. If the doctor reveals that the procedure is practicable, that the risks can be estimated, and that the results are predictable, the patient's informed consent is valid. The criterium does not test information *per se*, but rather, it tests disclosure. To illustrate this, assume that a surgeon informs his patient that the only way to restore him to his previous state of health is an experimental operation with only a marginal chance of success. If the surgeon outlines the procedure, risks, and probable results, there is sufficient disclosure to permit the patient to take the risk if he chooses to do so.[78] This illustration coincides exactly with the facts in the *Kaimowitz* case. Under an informed consent approach, without the stringency of the constitutional requirements, it is possible that the psychosurgery could have been performed without any legal repercussions.

The other necessity for valid informed consent is a manifestation that the patient has given permission for the treatment to be performed. Absent a constitutional theory of personal waiver, there is no reason that the consent of his parents should not bind Louis Smith. In similar medical treatment situations, parental consent binds the incompetent. For electroshock treatment the consent of a parent or guardian operates to bar subsequent litigation for assault and battery.[79] Admittedly, the gravity of the proposed psychosurgery exceeds that of the electroshock treatments. The dimension and seriousness of the treatment should logically effect the stringency of the test for comprehension. It should not, however, reallocate the burden and the right to consent from the guardian to the incompetent. Under an

77. *See* note 75 *supra* at 568.

78. Although it is said that a doctor experiments at his own peril it is generally accepted that a patient may consent to an experimental procedure if fully informed of the risks involved. Slater v. Baker, 95 Eng. Rep. 860 (K.B. 1767); Fortner v. Koch, 272 Mich. 273, 261 N.W. 762 (1935).

79. Farber v. Oklon, 40 Cal. 2d 503, 254 P.2d 520 (1953).

informed consent approach, the psychosurgery in *Kaimowitz* could have been performed.

In conclusion, the constitutional premise of the *Kaimowitz* decision is both valid and defensible. It recognizes both the reality of Louis Smith's incompetence to consent to psychosurgery and the gravity of the psychosurgery itself. It is probable that this type of analysis would not have been possible within the established framework of the informed consent doctrine. However, as the case represents a departure from this familiar approach, it may not serve as the definitive answer to the issues posed by psychosurgery on detained populations. For this reason, legislation in this area, on a national or state level, may be necessary.

## III. The Proposed Legislation

Portugal outlawed psychosurgery in 1936.[80] The U.S.S.R. outlawed psychosurgery in 1951.[81] In America, such legislation was first proposed on a national level in 1900. A senate bill "For the Regulation of Scientific Experiments Upon Human Beings"[82] died in committee. Seventy-three years later, a similar bill has been introduced in Congress. House Bill 6852[83] would expressly prohibit all types of brain surgery intended to alter human behavior. The punishment for violation would be a ten thousand dollar fine. While no action has yet been taken on this bill, two other less rigid resolutions have been introduced in the Senate. One would establish a national human experimentation board to investigate the problem and to offer guidelines for experimental procedures.[84] In addition, a two year moratorium would be placed on all psychosurgical operations. The second bill in the Senate would deny federal funds to any organization, institution, hospital, or foundation involved in activity where human subjects are at risk.[85] This activity would include any research where a human is exposed to the possibility of physical, psychological, or sociological harm. These two bills are presently detained in committee.

A more moderate proposal has been offered by the Institute of Society, Ethics, and Life Sciences at Hastings on the Hudson. It would permit experimental psychosurgery only in cases of demonstrable brain pathology or abnormality. No experimentation on detained populations or children would be legal. Certainly psychosurgery must be viewed as the treatment of last resort and is only acceptable when all other treatments have failed. If this proposal were legislatively adopted, it would be specific remediation for the *Kaimowitz* problem.

80. Trotter, *A Clockwork Orange in a California Prison, see* note 12 *supra.*
81. *Id.*
82. S. 3424, 56th Cong., 1st Sess. (1900).
83. H.R. 6852, 93d Cong., 1st Sess. (1973).
84. S. 934, 93d Cong., 1st Sess. (1973).
85. S. 878, 93d Cong., 1st Sess. (1973).

Any legislation in the psychosurgery area must balance the conflict between the right of the individual to freedom of choice and the right of society to protection from criminal and antisocial behavior. Congress would be an appropriate forum for a discussion of the sensitive political and ethical questions involved. And a uniform federal standard, supplemented by corresponding state legislation, would be preferable to a case by case approach.

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